



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 14, 2007

Mr. Joe Gorfida, Jr.  
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OR2007-16549

Dear Mr. Gorfida:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 297977.

The City of Richardson (the "city") received a request for access to and a copy of all responses to request for proposals No. 703-07. You claim that portions of the requested information are excepted from disclosure under section 552.104 of the Government Code. In addition, you state that pursuant to section 552.305 of the Government Code, you notified two third parties whose information is responsive to the request, Tessitura Network, Inc. ("Tessitura") and AudienceView Ticketing Corporation ("AudienceView"), of the request and of their right to submit arguments explaining why the information is excepted from required public disclosure. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). We have considered the exception you claim and the third parties' arguments and reviewed the submitted information.

We begin with your section 552.104 claim, which you bring for AudienceView's price chart and Tessitura's document titled "Tessitura Fee Recap for Eismann Request for Proposal #3070-03." AudienceView also joins in your section 552.104 claim for its price chart. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental

body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). This exception requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). Generally, section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded. Open Records Decision Nos. 306 (1982), 184 (1978). In this case, you inform us that the city has awarded the bid to Tessitura. You argue, however, that the release of AudienceView's price chart and Tessitura's Fee Recap document would give an unfair advantage to those companies' competitors because, you argue, it would give the competitors an indication of the bids needed to defeat the bids of AudienceView and Tessitura for future bidding situations.

We find that your assertion that the release of the information might give a bidder an unfair advantage on unidentified future contracts is too speculative. *See* Open Records Decision No. 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative to withhold information under predecessor statute). Thus, after carefully reviewing the arguments and the submitted information, we find that the city has failed to adequately demonstrate that the release of the submitted information would harm the competitive interests of the city for purposes of section 552.104. *See* Open Records Decision No. 592 at 8 (1991) (purpose of section 552.104 is to protect governmental body's interests in competitive bidding situation). Therefore, the city may not withhold any of the requested information under section 552.104.

Tessitura raises section 552.110 for portions of its responsive information. AudienceView raises no specific exception, but its claim is, generally speaking, that the requestor is seeking the information to gain a competitive advantage, to access its trade secrets, and to cause it substantial competitive harm. You state that the city does not take a position as to the confidential nature of the information under section 552.110.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving

materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>1</sup> This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). An interested third party raising subsection (b) of section 552.110 must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

After reviewing the companies' arguments and the information at issue, we conclude that Tessitura has established a *prima facie* case that portions of its information are trade secrets. Because we have received no argument to rebut Tessitura's claim as a matter of law, you must withhold this information under section 552.110(a). We further find that Tessitura has shown that some of its information constitutes commercial or financial information, the release of which would cause it substantial competitive harm. We have marked the portions of Tessitura's information that are excepted from disclosure under section 552.110.

However, we find that AudienceView has failed to establish that any portion of its information is a trade secret. We also conclude that AudienceView has failed to demonstrate

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<sup>1</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

that any portion of its information constitutes commercial or financial information, the release of which would cause the company substantial competitive harm. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Accordingly, we determine that no portion of AudienceView's information is excepted from public disclosure under section 552.110 of the Government Code.

In conclusion, the city must withhold the marked portions of Tessitura's information based on section 552.110 of the Government Code. The city must release the remaining information related to Tessitura and all of AudienceView's information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

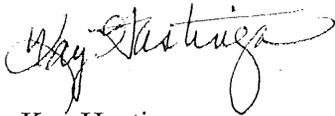
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be

sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kay Hastings  
Assistant Attorney General  
Open Records Division

KH/sdk

Ref: ID# 297977

Enc: Submitted documents

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